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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 JORGE ALEJANDRO PULIDO
12 COLMENERO,

13 Petitioner

14 v.

15 JAMES ROBERTSON, Warden,

16 Respondent.

Case No. CV ED 22-1215-DMG (GJS)

**ORDER ACCEPTING FINDINGS
AND RECOMMENDATIONS OF
UNITED STATES MAGISTRATE
JUDGE**

17 Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative habeas
18 petition (“Petition” [Doc. # 1]), all relevant documents filed and lodged in this
19 action, the Report and Recommendation of United States Magistrate Judge
20 (“Report” [Doc. # 20]), and Petitioner’s Objections to the Report [Doc. # 21].
21 Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has
22 conducted a *de novo* review of those portions of the Report to which objections have
23 been stated.

24 For the reasons stated below, Petitioner’s Objections to the Report do not
25 warrant any change to the Magistrate Judge’s findings and recommendations.
26 Petitioner objects, in relation to Grounds One and Five to Nine, that his right to
27 participate in the selection of his defense was violated under *McCoy v. Louisiana*,
28 138 S. Ct. 1500 (2018). [Doc. # 21 at 3–4, 6–7.] In *McCoy*, the Supreme Court

1 “h[e]ld that a defendant has the right to insist that counsel refrain from admitting
2 guilt, even when counsel’s experienced-based view is that confessing guilt offers the
3 defendant the best chance to avoid the death penalty.” 138 S. Ct. at 1505. Petitioner
4 argues that, under *McCoy*, his federal rights were violated when his defense counsel
5 selected a defense of factual innocence (specifically, third-party culpability) rather
6 than mental defect or insufficient evidence. [Doc. # 21 at 3–4, 6–7.] As the Report
7 discussed, however, Petitioner has not demonstrated his federal rights were violated
8 on this basis. Unlike the defense counsel in *McCoy*, Petitioner’s defense counsel
9 never conceded Petitioner’s guilt. [Doc. # 20 at 16.] Moreover, unlike the record in
10 *McCoy*, the record here contains “no indication that Petitioner voiced an opposition
11 to the third-party culpability defense presented at trial.” *Id.* Indeed, it appears that
12 Petitioner wanted to “present a full-on-I-am-one-hundred-percent-innocent-of-this-
13 crime defense at trial.” [Doc. # 15-6 at 8.]

14 Petitioner objects, in relation to Ground Three, that his defense counsel was
15 ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to
16 present a mental health defense. [Doc. # 21 at 3, 6.] But as the Report found,
17 Petitioner “fails to offer any evidence that a defense based on mental illness would
18 have resulted in a more favorable outcome at trial.” [Doc. # 20 at 19–20.] The
19 record contains no opinion from a mental health expert or any other evidence
20 suggesting that such a defense would have changed the outcome of the trial. Thus,
21 Petitioner’s claim that such a defense would have led to a different trial outcome is
22 “speculative” and “insufficient to establish prejudice” under *Strickland*. *Gallegos v.*
23 *Ryan*, 820 F.3d 1013, 1035 (9th Cir. 2016).

24 Petitioner objects, in relation to Ground Six, that his defense counsel failed to
25 subject the prosecutor’s case to meaningful adversarial testing under *United States v.*
26 *Cronic*, 466 U.S. 648 (1984). [Doc. # 21 at 5.] As the Report discussed, however,
27 Petitioner’s claim is not supported by the record, which shows that defense counsel
28 took several steps to challenge the prosecutor’s case throughout the trial, particularly

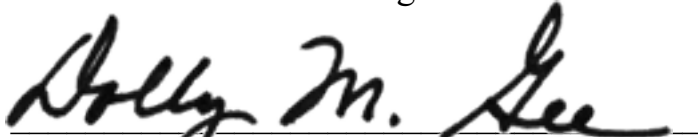
with a defense of third-party culpability. [Doc. # 20 at 17; *see also* Doc. # 15-3 at 237–46, Doc. # 15-7 at 42–72, 77–78, 132–51, 158–59, 174–77, Doc. # 15-8 at 80–97.] Petitioner objects, in relation to Ground Two, that the trial court violated his federal rights by denying his motion for substitution of counsel, which Petitioner had brought on the basis of an “irreconcilable conflict.” [Doc. # 21 at 7.] As a threshold matter, habeas relief is precluded for this claim because of the absence of clearly established federal law. The Supreme Court “has never held that an irreconcilable conflict with one’s attorney constitutes a per se denial of the right to effective counsel.” *Carter v. Davis*, 946 F.3d 489, 508 (9th Cir. 2019) (*per curiam*). Moreover, as discussed in the Report, Petitioner failed to show an irreconcilable conflict with his defense counsel, rather than merely a dissatisfaction or disagreement over trial tactics. [Doc. # 20 at 24.]

Petitioner objects, in relation to Ground Two, that due to a lack of communication with defense counsel, Petitioner was unaware of a plea offer of 15 years to life. [Doc. # 21 at 7.] The record shows, to the contrary, that Petitioner was aware of the plea offer and declined to accept it. [Doc. # 15-6 at 12.]

Petitioner objects that the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter. [Doc. # 21 at 8.] This claim is not cognizable on federal habeas review because it fails to present a federal question. *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000) (*per curiam*).

Having completed its review, the Court accepts the findings and recommendations set forth in the Report. Accordingly, **IT IS ORDERED** that the Petition is DENIED. Judgment shall be entered dismissing this action with prejudice.

DATED: April 22, 2024


 DOLLY M. GEE
 CHIEF UNITED STATES DISTRICT JUDGE